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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1625

STEPHEN L. GREGORY, et al.,
Petitioners,
v.
CURTIS W. TARR, National Director of
Selective Service, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Selective Service, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Stephen L. Gregory, and others,* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 26, 1971.

* Stephen L. Gregory, James E. Hovis, John B. Sharpless II, Richard J. Silverman and Thomas J. Clements.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 436 F.2d 513, in 3 Selective Service Law Rptr. [hereinafter cited as "SSLR"] 3682 and in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Michigan is reported in 311 F. Supp. 1, 2 SSLR 3524, 3604, and appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 26, 1971. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the federal courts have pre-induction jurisdiction to review the Selective Service System's denial of a deferment mandated by a System regulation, when that denial is based on a misrepresentation of those regulations.

2. Whether the federal courts have pre-induction jurisdiction to review the Selective Service System's denial of a regulatorily mandated deferment when that denial is based on a mistake of law.

3. Whether the federal courts have pre-induction jurisdiction to review the Selective Service System's denial of a regulartorily mandated deferment when that denial is based on a regulatory provision which is void because not

in conformance with the Selective Service Act, arbitrary, and capricious.

4. Whether Selective Service registrants who are fathers, otherwise qualified for the fatherhood III-A deferment (32 C.F.R. §1622.30(a) (Jan. 1, 1970)) and who have had a graduate but not undergraduate II-S student deferment since June 30, 1967, are entitled to the fatherhood III-A deferment as a matter of law.

STATUTES AND REGULATIONS INVOLVED

Section 6(h) of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(h) (Supp. IV, 1969) provides in pertinent part:

> (1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such a deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree . . . . No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupa-

> tion or employment necessary to the maintenance of the national health, safety, or interest. . . .
>
> (2) . . . Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. . . .

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. §460(b)(3) (Supp. IV, 1969), provides in pertinent part:

> (3) . . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

Selective Service Regulation 1622.30(a), 32 C.F.R. § 1622.30(a) (Jan. 1, 1970)*, provided:

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* *See* fn. 1, *infra.*

1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

Selective Service Regulation 1622.15(b), 32 C.F.R. § 1622.15(b) (Jan. 1, 1971), provides in pertinent part:

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this paragraph

(1) who has previously been placed in Class I-S thereunder or

(2) who has been deferred as a student in Class II-S and has received his baccalaureate degree.

> A registrant who is placed in Class I-S under the provision of this paragraph shall be retained in Class I-S
>
> (1) until the end of his academic year or
>
> (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier. . . .

Selective Service Local Board Memorandum No. 87, Apr. 19, 1968, as amended, Sept. 24, 1970 (SSLR 2200), Subject: Clarification of I-S(C), provides as follows:

> Section 1622.15(b)(2) of the Selective Service Regulations refers to a registrant who has been placed in Class II-S as an undergraduate after June 30, 1967, and has a baccalaureate degree.
>
> Curtis W. Tarr

STATEMENT OF THE CASE

Petitioners are members of a class of Selective Service registrants who are fathers of a child or children with whom they maintain a bona fide family relationship in their homes and who have received graduate, but not undergraduate, II-S student deferments since June 30, 1967. They applied for and were denied the fatherhood III-A deferment under Selective Service Regulation 1622.30(a); 32 C.F.R. § 1622.30(a) (Jan. 1, 1970) [hereinafter Selective Service Regulations are cited as "Regulation" with the number]. Having been ordered to report for induction, petitioners brought this action in the United States District Court for the Eastern District of Michigan, on behalf of themselves and others similarly situated, joining as defendants the respondents, the National Director of Selective Service, various state directors, and Selective Serv-

ice local boards.** They sought a declaratory judgment that they were entitled to the fatherhood III-A deferment as a matter of law and a writ in the nature of mandamus directing that this deferment be granted to them. Jurisdiction was invoked under 28 U.S.C. § 1331 (federal question), § 1343 (civil rights), § 1361 (mandamus to a federal officer) and §§ 2201-02 (declaratory judgment and its enforcement).

Petitioners raised three substantive arguments supporting their entitlement to the fatherhood deferment: (1) that Regulation 1622.30(a), when properly interpreted, mandated that they receive such deferments; (2) that the exception in the Regulation, if not interpreted to mandate that they receive such deferment, was void as promulgated under a mistake of law; and (3) that if not misinterpreted or promulgated pursuant to a mistake of law, the exception in the Regulation was contrary to the Military Selective Service Act of 1967, 50 U.S.C. App. § 450 *et seq.* [hereinafter cited as "the Act"], arbitrary and capricious and therefore invalid. Petitioners also contended that the

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** Lewis B Hershey, National Director of Selective Service [later Curtis W. Tarr]; Robert K. Custer [later Wayne E. Rhodes], Indiana State Director of Selective Service; John H. Hammack, Illinois State Director of Selective Service; Arthur A. Holmes, Michigan State Director of Selective Service; Robert P. Knight, Minnesota State Director of Selective Service; Illinois Selective Service Local Board No. 75, Chicago, Illinois (Robert J. Weiss, Dr. Harry A. Gold, Harry M. Corbett, Francis T. Schndpola, James Stepanek); Illinois Selective Service Local Board No. 178, Oregon, Illinois (G. M. Etnyre, Jr., Bernard Felt, Marion E. Miller, S. B. Norton, Dr. R. W. Ziegler, Jr.); Indiana Selective Service Local Board No. 65, Valpariaso, Indiana (Keith Brown, Martin Miller, John Thomas, Fred Reibly, and Robert Watts); Michigan Selective Service Local Board No. 85, Ann Arbor, Michigan (Harold Dorr, Louis Burke, Robert Ross, Louis Vogel and James Jones); Minnesota Selective Service Local Board No. 50, Wayzata, Minnesota (Everett Getten, Kenneth P. Fortin, John B. Jordan, Edward J. McIntee and John J. Sisterman).

District Court had jurisdiction over the controversy, despite Section 10(b)(3) of the Act, pursuant to this Court's opinions in *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233 (1968) and *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970).

The District Court agreed with the contention of the petitioners concerning jurisdiction, upheld the petitioners' claims on the merits, granted the declaratory judgment, and ordered the reclassification. On January 26, 1971, the Court of Appeals for the Sixth Circuit reversed the judgment of the District Court holding that the action was barred by Section 10(b)(3) of the Act and this Court's opinion in *Clark v. Gabriel*, 393 U.S. 256 (1968).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISIONS IN BREEN AND OESTEREICH AND WITH THE DECISIONS OF OTHER CIRCUIT COURTS ON THE QUESTION OF PRE-INDUCTION JUDICIAL REVIEW.

A. The Decision Below Fails To Observe The Mandatory-Discretionary Distinction Announced In *Breen* and *Oestereich*.

Petitioners here, as plaintiffs below, argued that they had been unlawfully deprived of the mandatory fatherhood III-A deferment.[1] To determine whether or not this deferment was mandatory it was necessary to interpret the

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[1] "In Class III-A *shall be placed* any registrant who has a child or children with whom he maintains a bona fide family relationship in their home. . . ." Regulation 1622.30(a) [emphasis supplied]. [Executive Order No. 11527, 35 F.R. 6572 (April 23, 1970) terminated the availability of the fatherhood III-A deferment to registrants requesting such deferment after April 22, 1970. The Executive Order, however, expressly provided that any registrant who prior to April 23 "submitted to his local board information establishing his eligibility" for a fatherhood deferment under Regulation 1622.30(a) (Jan. 1, 1970) or "who is so classified prior to such date" shall be placed in Class III-A (fatherhood) so long as he remains eligible for the deferment. The plaintiffs in the case at bar, of course, had all submitted requests for deferment prior to April 23, 1970, and E.O. 11527 thus in no way affects their eligibility for fatherhood III-A deferments. E.O. 11527 revoked Reg. 1622.30(a) (Jan. 1, 1970) and renumbered the old Reg. 1622.30(b) (hardship deferments) as a new Reg. 1622.30(a). References in this petition to Reg. 1622.30(a), however, are to the *old* 1622.30(a) since that regulation still governs plaintiffs' eligibility for deferment.]

exception in the Regulation[2] to bar from the fatherhood III-A deferment only those registrants who had been given an undergraduate but not a graduate II-S student deferment since June 30, 1967, or to hold this exception void as founded on a mistake of law or as contrary to the Act, arbitrary and capricious. The District Court held for the plaintiffs on all three grounds (p. 32). The Court of Appeals, however, declined to interpret the Regulation: "We can see no reason to accept the plaintiffs' invitation to interpret the regulation" because of its "view of *Oestereich,* that only statutorily unauthorized actions of the Selective Service are open to pre-induction judicial review except as a defense to a criminal prosecution" (pp. 41, 42).

In so holding, the Court below misinterpreted *Oestereich v. Selective Service Local Board No. 11,* 393 U.S. 233 (1968); *Clark v. Gabriel,* 393 U.S. 256 (1968); and *Breen v. Selective Service Local Board No. 16,* 396 U.S. 460 (1970). These cases establish that, despite Section 10(b)(3) of the Act, pre-induction review will lie where a local board has denied to a qualified registrant a classification made mandatory by relevant law. *Oestereich* involved a divinity student whose exemption from Service was mandated by Section 6(g) of the Act, *Breen* an undergraduate student whose deferment was mandated by Section 6(h)(1) of the Act. They had been reclassified as delinquent pursuant to regulations which this Court found unauthorized by the Act. This Court characterized the actions of the respective local boards as "basically lawless" (393 U.S. at 237) and held

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[2] ". . . except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph." *Ibid. Cf.* Local Board Memorandum No. 87, April 19, 1968, as amended, September 24, 1970, SSLR 2200, in which a similar reference in Regulation 1622.15 to Class II-S is interpreted to refer only to the undergraduate II-S deferment.

that pre-induction review would lie where "a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service." 396 U.S. at 467. Conversely, in *Gabriel,* in a short per curiam opinion entered without argument, this Court concluded that pre-induction review would not lie of a local board's denial of a conscientious objector exemption, an act which "inescapably involves a determination of fact and an exercise of judgment" and one which is expressly committed by the Act to the local board. 393 U.S. at 258. The distinction sought to be drawn in these cases was clearly one between mandatory and discretionary classifications as Justice Harlan recognizes in his concurring opinion in *Breen.* 396 U.S. at 468.

The "relevant law" in the instant case entitled plaintiffs to a deferment under a Regulation which confers no discretion on a local board but provides: "In Class III-A *shall be placed* any registrant who has a child or children with whom he maintains a bona fide family relationship in their home . . ." Regulation 1622.30(a) [emphasis supplied]. The grant of the fatherhood III-A requires only that the local board determine that the registrant have a child with whom he maintains a bona fide family relationship in his home; likewise, the grant of the ministerial exemption at stake in *Oestereich* requires that the local board determine that the registrant is preparing for the ministry under the direction of a recognized church by pursuing a full-time course of instruction. *See* Regulation 1622.32. Both determinations are objective ones, and immediately upon corroboration that the registrant fulfills the criteria, the local board must grant the classification as requested. There are no evaluations to be made, no subjective analyses required or allowed, no discretion permitted in granting or withholding of the observed classifications, no question

which inescapably involves a determination of fact and an exercise of judgment. Indeed, it is uncontested that the petitioners fulfill the above criteria. The only issue on the merits is the interpretation and validity of the Regulation. By denying pre-induction review of a question concerning a mandatory classification the Court below has ignored precisely the distinction which the *Breen, Oestereich,* and *Clark* cases have created.

Once it is determined that the underlying claimed classification is mandatory, the *Breen-Oestereich* doctrine may also require that the denial of the classification be found to be "blatantly lawless" or "basically lawless," as the test is elsewhere stated. 393 U.S. at 238. This test simply requires that the issues involved be legal ones. Any suggestion that this Court was requiring that the legal issues be easy ones (a view suggested by the Sixth Circuit's casual treatment of the merits in this case) was laid to rest in *Breen,* in which this Court held the delinquency regulations unauthorized by the Act, despite Circuit Court holdings to the contrary. *E.g., Anderson v. Hershey,* 410 F.2d 492 (6th Cir. 1969), *vacated and remanded,* 397 U.S. 47 (1970). When the "basically lawless" test is viewed as requiring simply that the issues be legal ones, the instant case fulfills the requirement. Interpretation of the Regulation, mistake of law, and the conformity of the Regulation to the Act and to due process are all traditional legal issues, as opposed to factual issues or mixed questions of law and fact. Granted the mandatory nature of the underlying deferment, such issues are judicially cognizable under the *Breen-Ostereich* test.

B. In Rejecting The Mandatory-Discretionary Distinction The Opinion Of The Court Below Conflicts With Other Circuit Courts' Holdings That Pre-induction Review Is Available When A Local Board Has Violated A Mandatory Duty.

Numerous Circuit Courts have recognized that pre-induction review will lie under *Breen* and *Oestereich,* even in the absence of an issue concerning delinquency, if the underlying claimed classification is mandatory in nature and the issue is a legal one. The largest number of cases involve the I-S deferment under Section 6(i) of the Act. The Circuit Courts uniformly hold pre-induction judicial review available to enforce the right to that deferment. *E.g., Bowen v. Hershey,* 410 F.2d 962 (1st Cir. 1969); *Carey v. Local Board No. 2,* 412 F.2d 71 (2d Cir. 1969); *Foley v. Hershey,* 409 F.2d 827 (7th Cir. 1969); *Nestor v. Hershey,* 425 F.2d 504 (D.C. Cir. 1969); *cf. Rich v. Hershey,* 408 F.2d 944 (10th Cir. 1969). [These cases are hereinafter cited as "the I-S cases."]

It is true that the instant case does not involve an underlying classification mandated by the Act but rather one which at the time was mandated by regulation. The Court below was of the view that *Oestereich* required "that only *statutorily* unauthorized actions of the Selective Service are open to pre-induction judicial review [emphasis supplied]. . . ." (p. 42) This view is at odds with *Shea v. Mitchell,* 421 F.2d 1162 (D.C. Cir. 1970) and *Hunt v. Board No. 197,* 3 SSLR 3647 (3d Cir. Feb. 5, 1971) *(en banc).* Because Selective Service regulations bind the local boards with the force and effect of law (*see, e.g., United States v. Eisdorfer,* 299 F. Supp. 975, 986-87 (E.D.N.Y. 1969)), the D.C. Circuit in *Shea* concluded that the "relevant law" focused upon in *Breen* as the source of the manda-

tory classification clearly could be a regulation. In holding that pre-induction review would lie to challenge a delinquency reclassification from the same fatherhood III-A deferment involved in the instant case, that Court held that: "[W]hether that 'law' involves statutes, court decisions, or regulations is as irrelevant as whether it involves an 'exemption' or a 'deferment'." 421 F.2d at 1165-66. The essence of *Oestereich* and *Breen,* in other words, is not the source of a local board's duty, but the nature of that duty. For a similar holding that the mandatory nature of the fatherhood III-A makes claims for it cognizable in pre-induction judicial review, *see Wright v. Local Board No. 105,* 319 F. Supp. 509 (D. Minn. 1970).

The *Hunt* case also holds that pre-induction judicial review is available when the board has violated a duty under a regulation which properly interpreted mandates that it perform a certain function. *Hunt* goes even further than *Shea v. Mitchell, supra,* since it was unclear in *Hunt* whether the underlying claimed classification was the mandatory fatherhood III-A or the discretionary "hardship III-A" under Regulation 1622.30(b).[3] No one view of the case commanded a majority of the Court in *Hunt,* although the Court's holding was to reverse the dismissal of the District Court for lack of jurisdiction. The separate opinions of Judge Gibbons and Judge Hastie, however, which go to make up the majority, both indicate that pre-induction review will lie where a local board has refused to perform a duty mandated by regulation (in that case the duty imposed by Regulation 1625.2, as interpreted in *Mulloy v. United States,* 398 U.S. 410 (1970), to reopen a file after the registrant has presented a *prima facie* case for reclassification). The opinion of the other three concurring

[3] As of Jan. 1, 1970. *See* fn. 1, *supra.*

judges in *Hunt* presents an even squarer conflict with that of the Court below and will be dealt with, *infra*. For other cases holding that violation of mandatory regulations gives rise to pre-induction review without regard to the nature of the underlying claimed classification, *see Wiener v. Local Board No. 4*, 302 F. Supp. 266 (D. Del. 1969); *Liese v. Local Board No. 102*, 2 SSLR 3688 (E.D. Mo. April 15, 1970); *Rhem v. Local Board No. 104*, 3 SSLR 3437 (W.D. Wis. November 20, 1970); *Rich v. Hershey*, 3 SSLR 3490 (D. Colo. August 21, 1969); *cf. Edwards v. Selective Service Local Board No. 111*, 432 F.2d 287, 296-98 (5th Cir. 1970) (Tuttle, J., dissenting).

II.

THE MISINTERPRETATION OF SECTION 10(b)(3) BY THE COURT BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AND LEADS TO CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUIT COURTS AND OF THIS COURT.

In the District Court below plaintiffs argued, and the District Court found, that the exception in the Regulation, if not misinterpreted, was invalid as, alternatively, (a) unauthorized by the Act, (b) founded on a mistake of law, or (c) arbitrary and capricious. The Court of Appeals, because of its view of *Oestereich* "that only statutorily unauthorized actions of the Selective Service are open to pre-induction judicial review" (p. 42), paused only to note that the Act had committed both the graduate II-S and fatherhood III-A deferments to the discretion of the President and to hold that the President's acts were unreviewable under Section 10(b)(3).

This holding misconceives the Section. Section 10(b)(3) prohibits judicial review of the "classification and processing" of a registrant. The reference in the Section to

judicial review of Presidential decisions indubitably refers to the President's authority, just described in preceding sentences of Section 10(b)(3), to review individual classification decisions (a function which the President has delegated to the National Appeal Board; *see* Regulation 1604.6; 50 U.S.C. App. §460(c)). The reference is clearly not intended to refer to the President's rule-making function under Section 6(h) and other sections of the Act. On the basis of this basic misinterpretation of the Act, the lower Court went on to decide the issues raised as to the invalidity of the Regulation in a manner which conflicts in principle with decisions of other circuits and of this Court.

A. The Lower Court's Approach To Determining The Statutory Authority For The Regulation Ignores The Act As A Whole And Thus Conflicts With Decisions Of This Court And With Decisions Of Other Circuit Courts.

The plaintiffs argued below that if the Regulation were interpreted to bar those who had received the graduate as well as the undergraduate II-S deferment from receiving the fatherhood III-A, the Regulation was invalid because not in conformance with the statutory scheme laid out by Congress in the Act. Section 6(h)(1) of the Act conditions the granting of the mandatory undergraduate II-S deferment upon the registrant's relinquishment of his right to the fatherhood III-A deferment. No such language is contained in Section 6(h)(2) which authorizes the discretionary II-S graduate deferment, and there is no indication that Congress intended that the deferment be so conditioned. Indeed, Congress in 1967 reenacted Section 6(h)(2) substantially unchanged and clearly intended to preserve the existing scheme of deferments under which

those who had had the discretionary II-S remained entitled to the statutorily mandated I-S and the regulatorily mandated fatherhood III-A. *Compare* H.R.Rep. No. 267, 90th Cong., 1st Sess., at 27 (1967) *with* S. Rep. No. 209, *id.*, at 6-7 (1967); *see* H.R. Rep. No. 346 (Conf. Rep.), *id.*, in 113 Cong. Rec. 16427 (June 20, 1967). For the Executive to change this in the light of the legislative history, plaintiffs contended, and particularly for it to ignore the carefully created legislative distinction between discretionary graduate and mandatory undergraduate deferments requires specific statutory authority. Put another way, in Section 6 (h)(2) of the Act, Congress has said that no one who has had an undergraduate II-S shall be eligible for a fatherhood III-A. This legislative statement about Section 6 (h)(1) deferments impliedly says that one who has received a Section 6(h)(2) deferment shall be eligible for a fatherhood III-A.

The Selective Service Act is detailed and complex, not a broad grant of discretionary authority. Although Section 6(h)(2) concededly grants the President the authority to defer any or all fathers from Service, this Court has required considerably more statutory authority to support Selective Service regulations than is common with other administrative agencies operating under broader statutes and with less sensitive topics. In *Gutknecht v. United States,* 396 U.S. 295 (1970), this Court struck down the delinquency regulations as unauthorized by the Act, despite reference in the Act to the induction of delinquents. This Court found that the provisions in the Act concerning the order of call implicitly excluded any Presidential authority to promulgate regulations under which the boards would induct delinquents out of their normal order of call. The *Gutknecht* decision requires strict adherence by the Executive to the terms of the Selective Service Act. His

power to promulgate rules and regulations under the Act does not extend to areas not covered by the Act. The failure of the Court below to recognize the applicability of *Gutknecht* to the case at bar is at odds with the methodology used by this Court in interpreting the scope of Presidential authority under the Selective Service Act. *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), for an example of the same technique.

Even if this Court does not accept the argument made above that *Breen* and *Oestereich* apply to the mandatory fatherhood III-A deferment, the decision in the lower Court still conflicts in principle with other Circuit Court decisions holding pre-induction review available where a regulation invalid under the Act has been used to deny even a discretionary deferment. For example, in *Bucher v. Selective Service System Local Board No. 2*, 421 F.2d 24 (3d Cir. 1970), the Third Circuit invalidated the delinquency reclassifications of registrants who had been classified in the discretionary II-S, III-A, IV-F and I-Y classifications. *See National Student Ass'n v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969), for a similar holding.

B. The Circuit Court's Rejection Of The Plaintiffs' Argument That The Regulation Was Invalid Because Promulgated Under A Mistake of Law Conflicts With Decisions Of This Court In Other Areas Of Administrative Law.

One sentence in the Circuit Court opinion states that it does not believe that the Executive was laboring under a mistake of law in promulgating the Regulation in question (p. 42). This sentence conflicts with the express finding of the District Court that "plaintiffs have been denied fatherhood III-A deferments because of the defendants'

belief that the Act prohibits the granting of such deferments to registrants who have received a graduate II-S deferment since June 30, 1967" (p. 32). The position taken by the Selective Service System with regard to the I-S indicates that it was laboring under this mistake when it prepared Regulation 1622.30(a) for Executive approval. *See* the "I-S cases," *supra*. The existence of this mistake is further confirmed by the fact that Regulation 1622.30(a) bars from the III-A fatherhood deferment only those who have received the II-S since the effective date of the Act, June 30, 1967.[4]

The Circuit Court rejected this argument because it believed that only statutorily *unauthorized* acts were reviewable under Section 10(b)(3). This position ignores a basic fact that the review of regulations is not itself prohibited by Section 10(b)(3), as argued above. Further, this Court has held on numerous occasions that acts committed to Executive discretion may be reviewed for a mistake of law in order that the administrative decision may be based on the proper law. *See, e.g., Leedom v. Kyne*, 358 U.S. 184 (1958); *McGrath v. Kristensen*, 340 U.S. 162 (1950); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). If the Circuit Court's opinion is allowed to stand, then any decision on a Selective Service matter committed to the discretion of the Executive cannot be reviewed in a pre-induction pro-

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[4] *See* Local Board Memorandum No. 84, issued October 23, 1967 (SSLR 2199), which combines graduate and undergraduate II-S deferments for purposes of determining whether the deferment has been "requested," thus barring a further fatherhood III-A under the terms of § 6(h)(1) of the Act. Section 6(h)(2), which authorizes the graduate II-S deferment, contains no provision either barring further deferments or requiring that they be "requested." The lumping of graduate together with undergraduate II-S deferments in the Memorandum and the resultant blurring of the distinction between the two sought to be preserved in §§ 6(h)(1) and 6(h)(2) serves as a further indication that the Selective Service System failed to perceive that distinction.

ceeding even if based on the clearest misinterpretation of the law. This would give the Executive authority in the Selective Service area unknown in any other branch of administrative law. Such a result would indeed raise "serious constitutional questions." 393 U.S. at 243 (Harlan, J., concurring).

C. The Decision Of The Circuit Court That It had No Jurisdiction To Determine Whether The Regulation Was Constitutionally Invalid Conflicts With The Decision of Another Circuit Court on the Same Issue.

The plaintiffs below argued that the Regulation in question was arbitrary and capricious. It was unreasonable, the plaintiffs argued, to condition the granting of the graduate II-S deferment on the denial of any further fatherhood III-A deferment and yet not to so condition any other discretionary deferment, such as the II-A occupational deferment. The Circuit Court ignored this argument entirely, resting on the proposition that if the Executive had discretion in promulgating regulations, no review would lie under Section 10(b)(3). In this regard, its decision conflicts in principle with the decision of the D.C. Circuit in *National Student Ass'n v. Hershey,* 412 F.2d 1103 (D.C. Cir. 1969), in which the D.C. Circuit reviewed the delinquency regulations in a pre-induction case and found them constitutionally deficient.

The Circuit Court's opinion, if allowed to stand, would lead to the anomalous result of permitting judicial review in those areas in which the Selective Service System has done something contrary to the Act, but not permitting such review if the regulations promulgated by the System are constitutionally invalid. We would thus be squarely

faced with the dilemma posed by Justice Harlan in his concurring opinion in *Oestereich,* 393 U.S. at 242-43 and n.6. Local boards, as Justice Harlan points out, are not legally trained and are not capable of determining questions of law, certainly not complex constitutional questions. If judicial review is denied in this case the "serious constitutional problems" envisaged by Justice Harlan would be presented. For "[t]o withhold pre-induction review in this case would . . . deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." 393 U.S. at 243.

III.

THE OPINION BELOW CONFLICTS ON BOTH THE JURISDICTIONAL ISSUE AND ON THE MERITS WITH THE VIEWS EXPRESSED BY THE THIRD CIRCUIT EN BANC IN HUNT v. LOCAL BOARD No. 197.

The basic thrust of the opinion below is jurisdictional with occasional animadversions on the merits. Whether the opinion be viewed as one on jurisdiction or one on the merits, however, it conflicts with the opinions *en banc* of the Third Circuit in *Hunt v. Local Board No. 197,* 3 SSLR 3647 (Feb. 5, 1971).

No one view of the fatherhood deferment issue commanded a majority of the *Hunt* court. Three of the seven judges, however, Judges Freedman, Seitz, and Adams, fully adopted the District Court holding in the instant case that as a matter of law registrants who have had graduate but not undergraduate II-S deferments under the 1967 Act are entitled under Regulation 1622.30(a) to the mandatory III-A fatherhood classification and that pre-induction jurisdiction lies under the *Breen-Oestereich* doctrine. 3 SSLR

at 3652. Chief Judge Hastie, recognizing the substantial question of interpretation involved in Regulation 1622.30 (a), preferred to avoid the *Breen* and *Oestereich* doctrine and to rest on the ground that the mandatory duty of the local board to reopen could be enforced under Section 1361 of 28 U.S.C. He stated, however, that were the case one of judicial review rather than mandamus an interpretation of Regulation 1622.30(a) to prohibit those who have had the graduate II-S as well as the undergraduate II-S deferments from receiving fatherhood deferments "might well be reversed as erroneous" (3 SSLR at 3653), thus suggesting that he is in substantial compliance with the views of Judges Freedman, Seitz, and Adams. Judge Gibbons, in an opinion more fully discussed *supra* (3 SSLR at 3648), and Judges Aldisert and Van Dusen (3 SSLR at 3656) did not reach a contrary conclusion, but stated only that they did not reach the question in the procedural posture of the case. It is therefore evident that on the precise question of fatherhood deferment present both in *Gregory* and *Hunt,* a majority of the Third Circuit (Judges Freedman, Seitz, and Adams, with Chief Judge Hastie in substantial compliance) have reached an opinion which is in conflict with the stance taken by the Court below.

Nor is the Third Circuit the only court to agree with Judge Smith in the District Court below. While the class action nature of the District Court judgment below has prevented a full consideration of its merits in some cases (*e.g., Whitmore v. Tarr,* 318 F. Supp. 1279 (D. Neb. 1970)), a number of District Courts have expressed their approval of its conclusions. *E.g., United States* ex rel. *Plotner v. Resor,* 3 SSLR 3342 (S.D. Ga. August 5, 1970); *Germonprez v. Director of Selective Service,* 318 F. Supp. 829 (D.D.C. 1970). While the number of people involved in the class is admittedly now quite small when compared to the total number of Selective Service registrants, there

has been a substantial amount of litigation as a result of this issue. (Counsel are aware of at least three other cases in addition to those cited above). Further, the issue vitally concerns the plaintiffs in these actions because their very liberty is at stake. On such an issue, and particularly in light of the national policy in favor of uniformity of interpretation of the Act, a conflict among the circuits, we respectfully submit, should not go unresolved.

IV.

THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING PRE-INDUCTION REVIEW WHICH HAVE NOT BEEN, AND SHOULD BE, DECIDED BY THIS COURT.

Whether the decision below be regarded as in conflict with the decisions of this Court and of other Circuit Courts on the question of pre-induction judicial review or whether it be regarded as in conflict with the decision of the Third Circuit on the merits, it clearly raises important questions concerning pre-induction judicial review which should be resolved by this Court. The flood of confusing and contradictory lower court pre-induction review decisions since *Oestereich* and *Breen* show a complete lack of consensus as to how to interpret and apply those two cases to more perplexing and varied challenges to Selective Service action. *See* Winick, *Direct Judicial Review of the Actions of the Selective Service System*, 69 Mich. L. Rev. 55, 71-91 (1970).

Some lower courts have focused on the reference in the *Oestereich* opinion to "blatantly lawless" actions by the local boards (failing to recognize that such action is also described as "basically lawless," 393 U.S. at 237) and have refused to entertain pre-induction suits except in those situations in which the delinquency regulations are involved. *E.g., Bookout v. Thomas,* 430 F. 2d 1343 (9th Cir.

1970) (no jurisdiction to review for procedural errors leading to a denial of the ministerial exemption, because the case "in no way involved the unauthorized delinquency regulations"); *Davis v. Members of Local Board,* 433 F. 2d 736 (5th Cir. 1970).

Most circuits, however, have perceived that the *Oestereich* doctrine cannot rationally be confined to the delinquency regulations and that the denial of a mandated deferment gives rise to pre-induction judicial review. *See, e.g.,* the "I-S cases," *supra.* The lower courts have, however, differed greatly as to the scope of the review available even where a statutorily mandated deferment was involved. *Compare* the "I-S cases," *supra,* with *Evans v. Local Board No. 73,* 425 F. 2d 323, 326 (10th Cir. 1970) (issue of law concerning the statutorily mandated II-S deferment unreviewable where the issue was "not uncontested" by the System and "not plain on the face of the Act").

Another source of confusion in the Circuits stems from a lack of understanding as to how the thrust of the majority opinions and those of Justice Harlan are to be reconciled in cases where, unlike *Oestereich,* the two approaches would not yield the same result. Under the majority approach carried to its logical conclusion, a pre-induction challenge to the denial of a discretionary classification is barred by Section 10(b)(3) even if that denial were founded on regulations or procedures unauthorized by the Act or the Constitution. Under Justice Harlan's approach pre-induction review, on the other hand, would lie in such circumstances because the Selective Service System does not provide a competent forum to adjudicate such matters. *See* Donahue, *The Supreme Court vs. Section 10(b) (3) of the Selective Service Act: A Study in Ducking Constitutional Issues,* 17 U.C.L.A. L. Rev. 908, 933-42 (1970).

That this divergence is of real and immediate concern is illustrated by *Fein v. Selective Service Local Board No. 7*, 430 F. 2d 376 (2d Cir. 1970), *cert. granted*, No. 1129, 39 U.S.L.W. 3384 (Mar. 8, 1971). The underlying claimed classification in *Fein* is the discretionary conscientious objector exemption (I-O), but it is not acts of discretion of which the petitioner complains but rather the denial of due process which accrued to him because of the failure of the State Director to notify him of the reasons for which he was appealing the classification. The Court of Appeals, over a strong dissent by Judge Lumbard, denied pre-induction review on the ground of the discretionary nature of the underlying classification, an arguably correct decision under the majority's approach. The case, however, presents the "serious constitutional questions" raised by Justice Harlan in his concurrence in *Oestereich*, for it involves a situation in which petitioner may be deprived of his "liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." 393 U.S. at 243. For other cases illustrating the conflict between the mandatory classification and competent forum approaches, *compare Edwards v. Local Board No. 111*, 432 F. 2d 287 (5th Cir. 1970) *with Hunt v. Local Board No. 197, supra, and Bucher v. Selective Service System Local Board No. 2, supra.*

It was not necessary in either *Oestereich* or *Breen* for this Court to choose between the majority and Justice Harlan tests, since under either test review would lie in those cases. Other opinions of this Court have indicated that a majority of the Justices may in fact now support the competent forum approach in preference to that indicated by the majority in *Oestereich. See Kolden v. Selective Service Local Board No. 4*, 397 U.S. 47 (1970), *vacating and re-*

manding 406 F. 2d 631 (8th Cir. 1969); *McKart v. United States,* 395 U. S. 185 (1969); *Clark v. Gabriel,* 393 U.S. at 260 (Douglas, J., concurring).

The issue of the proper standard by which pre-induction jurisdiction is to be determined is important not only because of the volume of litigation which it has produced[5] but also because of the underlying constitutional issues. As Justice Harlan intimated in his concurring opinion in *Oestereich,* the reason why this Court has interpreted Section 10(b) (3) as it has is because of the "serious constitutional questions" which would arise if the Act were not so interpreted, 393 U.S. at 243 & n. 6. *See United States v. Rumely,* 345 U.S. 41 (1953) and *Clark v. Uebersee Finanz-Korp.,* 332 U.S. 480 (1947), cited in *Oestereich,* 393 U.S. at 238.

The instant case presents other aspects of the issue on which this Court has already granted certiorari in *Fein.* It does not present the square conflict between the mandatory classification and competent forum tests that the *Fein* case does, since this case could be resolved under either test, but, like *Fein,* it presents an opportunity for clarification of the nature and contents of those tests. Under the mandatory classification approach, this case raises the question of whether the mandate may be found in the regulations as well as in the Act. Assuming that it may, this case raises the question of what types of legal issues may be resolved in pre-induction review once the underlying claim is found to be mandatory, and presents several regulatory, statutory, and constitutional issues for that deci-

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[5] *See* Donahue, *supra,* at 947, 968-74, citing over a hundred "wildly inconsistent" reported pre-induction review lower court opinions between *Oestereich* and April 15, 1970. The over fifty such opinions rendered since *Breen* show no indication of an emerging consensus.

sion. If a mandatory regulation is not sufficient to satisfy the mandatory classification test, then the question is raised as to whether pre-induction review should lie because the Selective Service System does not provide a competent forum for resolving some or all of those regulatory, statutory and constitutional issues. These are precisely the types of questions which have been troubling the lower Courts and on which a decision of this Court is needed.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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April 25, 1971

APPENDIX

Stephen L. Gregory et al., Plaintiffs,

v.

Lewis B. Hershey et al., Defendants.
Civ. A. No. 33057.

United States District Court,
E. D. Michigan, S. D.

Dec. 23, 1969.

OPINION OF THE DISTRICT COURT

Talbot Smith, District Judge.

This case comes before us on a complaint for declaratory judgment, and other relief, arising under the Selective Service Act of 1967, Pub. L. 90—40, June 30, 1967 (81 Stat. 100, 50 U.S.C. App. §§ 451—471), hereinafter termed "the Act." We are now ruling upon a Motion for Summary Judgment (Rule 56(a), Rules of Civil Procedure.)

The named plaintiffs bring the action in their own behalf of a class (Rule 23, Federal Rules of Civil Procedure), namely, Selective Service registrants who are fathers and who have received a deferment since June 30, 1967 as post-baccalaureate students pursuing a full-time course of instruction at a college, university, or similar institution of learning, under Section 6(h) (2) of the Act (this deferment being a "graduate II—S"). These plaintiffs have not, however, received pre-baccalaureate deferments ("undergratuate II—S's") since June 30, 1967. They have all been denied fatherhood III—A deferments by the Selective Ser-

vice System.[1] They assert that they are entitled to such deferment under the Act and Regulation as a matter of right, and that the denial of such deferment is an illegal action by the Selective Service System founded upon an erroneous interpretation of the law. They have exhausted their administrative remedies, and have received orders to report for induction.

The plaintiffs before us in person are generally in like positions with respect to the draft and to their education. They are graduate students. They are well along in preparation for their chosen professional careers. They are married (and, with one exception, prior to the effective date of the Act), are fathers, and have incurred the substantial financial obligations that are today's usual concomitant of advanced educational and professional training. In addition, there are significant health problems with respect to the families of some, but not all, of the plaintiffs, although not of such magnitude, in defendants' judgment, as to warrant the grant to the involved plaintiffs of hardship III—A deferments under Regulation 1622.30(b).

We turn at once to the Regulation in question, 1622.30 (a). It provides in pertinent part as follows:

> 1622.30 "(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of

[1] See, Act § 6(h) (2); Regulation 1022.30(a).

registrants in such category, except that a registrant who is classified in Class II—S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for clasification in Class III—A under the provisions of this paragraph."

Similarly, Section 6(h) (1) of the Act provides in part as follows:

"No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), * * * "

Subsection 6(h) (2) of the Act provides in part as follows:

"Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."

The question before us concerns the proper meaning and interpretation of the quoted portions of the Act and the Regulations. This, in turn, requires an examination of the statutory scheme of the Act. In Carey v. Local Board, D.C. 297 F. Supp. 252, aff'd 2 Cir., 412 F.2d 71, the Act was analyzed in the following terms:

"Section 6(h) (1) of the Act, 50 App. U.S.C. § 456 (h) (1), directs that the President shall provide for

the granting of deferments to students who are satisfactorily pursuing a full time course of instruction in a college at the undergraduate level. This statutory undergraduate deferment continues until the student receives a baccalaureate degree or reaches age twenty-four, which ever occurs earliest. This subsection has no predecessor in the earlier selective service acts. It was enacted in 1967 and became effective on June 30, 1967. Pursuant to 32 C.F.R. § 1622.25, students in this category are classified as II—S (undergraduate II—S deferment.)

"Another category of deferments is provided for in §6(h) (2) of the Act. This section includes an authorization for the President to provide by regulation for the deferment of graduate students whose deferment he considers essential to the national interest. This section was also enacted with the 1967 amendments, but an almost identical provision was present in the 1948 and 1951 Acts. Section 6(h) of those earlier Acts authorized the President to provide for the deferment of both graduate and undergraduate students, there having been no equivalent in those Acts to the mandatory deferment of undergraduates now found in the current § 6(h) (1). Graduate students deferred under the President's rule-making power are also classified as II-S under 32 C.F.R. §1622.26 (graduate II-S deferments).

"There is a third category of student deferment which applies to all university students, whether graduates or undergraduates. Under 32 C.F.R. § 1622.15 (b) this type of deferment is designated as I-S. Its source is § 6(i) (2) of the Act which has remained unchanged since 1951. * * *"

It is clear from the files and affidavits appended to the pleadings herein that plaintiffs have been denied fatherhood III—A deferments because of the defendants' belief that the Act prohibits the granting of such deferments to registrants who have received a graduate II—S deferment since June 30, 1967, relying upon Section 6(h) of the Act and Regulation 1622.30(a).

Such construction of both the Act and the Regulation is demonstrably erroneous. In the alternative, if only the Regulation is properly so construed, it is based upon an erroneous interpretation of the Act and unauthorized thereby. For the intent of the statute is clear. "No person," it reads in the quoted 6(h) (1) "who has received a student deferment under the provisions of this paragraph" (*this* paragraph being paragraph 1, the paragraph concerning the pre-baccalaureate, undergraduate II—S deferment) "shall thereafter be granted a deferment under this subsection" (subsection (h), authorizing fatherhood III—A deferments). But the crunch here is that these plaintiffs before us have never had a pre-baccalaureate, undergraduate II—S deferment under the Act. Hence they are not precluded from the fatherhood III—A by the express terms of the Act, and any construction or interpretation contrary thereto is obviously unlawful, as is any Regulation grounded upon such misconstruction. So far as the discretion of the Executive may be argued to support defendants' interpretation, such discretion is not boundless. Thus the Executive could not, in his discretion, provide for the deferment of Michigan fathers but not Indiana fathers. It must, to be lawfully exercised, not conflict with the express provisions of the Act.

A similar question has been presented in the so-called I—S cases. Those cases involved the availability of the I—S deferment under Section 6(i) (2) of the Act for those stu-

dents who (as the plaintiffs in the case before us) had received a graduate (but not an undergraduate) II—S deferment since the effective date of the Act, June 30, 1967. Regulation 1622.15(b) denies the right to a I—S deferment to a student who has previously received a II—S deferment, just as Regulation 1622.30(a) in the case before us denies a fatherhood III—A to registrants who have received a II—S. But upon a critical examination of the Act it has been clear to a number of courts, Ellis v. Hershey, 302 F. Supp. 347 (E.D. Mich. April 30, 1969); Bowen v. Hershey, 410 F. 2d 962 (1st Cir. 1969); Carey v. Local Bd. No. 2, D.C. 297 F. Supp. 252, aff'd 412 F.2d 71 (C.A. 2, 1969); Foley v. Hershey, 409 F.2d 827 (7th Cir. 1969); Marsano v. Laird, 412 F. 2d 65 (CA 2, 1969); that the Act forbade the granting of a I—S only to those students who had received an undergraduate II—S under Section 6(h) (1) of the Act, but not to those who had received a graduate II—S under the provisions of 6(h) (2) of the Act.

We are cited to portions of the legislative history tendered in explanation of the scheme of the statute, but we do not view the Act as involving the kind of ambiguity that warrants an examination of the legislative history for our guidance.

The defendants challenge our jurisdiction, arguing that Section 10(b) (3) of the Act bars pre-induction review. Defendants' obstacle, of course, is Oestereich v. Selective Service System Board No. 11, 393 U.S. 233, 89 S.Ct. 414, 21 L.Ed.2d 402 (1968). But defendants seeks to distinguish *Oestereich*. They rely primarily upon the concession by the Government found in that case. Thus, in this regard, the defendants argue

> "In his brief before the Supreme Court, the Solicitor General conceded that Oestereich was a full-time divinity student and recognized that he was therefore

entitled to the unequivocal exemption afforded such registrants by Section 6(g) of the Act. The Supreme Court agreed and held that Section 10(b) (3) would not bar pre-induction judicial review in that case. The Court accepted the Solicitor General's assurance that *Oestereich* was entitled to the divinity student exemption and agreed that there was no statutory authorization for his reclassification pursuant to regulations which were triggered by 'activities or conduct not material to the grant or withdrawal of the exemption' *(i.e.* Oestereich's status as a divinity student) 393 U.S. at 237, 89 S.Ct. 414. The Court therefore concluded that to compel one who was clearly *exempt* from military service to submit to such service (or to face criminal prosecution) in order to establish his 'plain and unequivocal' and *uncontested* right to such an exemption would be unduly harsh, 393 U.S. at 238, 89 S.Ct. 414, and held Section 10(b) (3) to be inapplicable." (Page 4, Defendants' Brief. All emphasis in original.)

We attach no significance to the concession by the Government in that case. Gracious it may have been, but the resolution of this kind of question does not turn upon Government's grace. Nor, as we read the case, did the Supreme Court rely upon any confession of error by the Government. Rather the thrust of its opinion was that the "conduct of [the] Local Board [was] basically lawless." 393 U.S. at 237, 89 S.Ct. at 416. Moreover, here, as in *Oestereich,* "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." *Id.* at 238, 89 S.Ct. at 416.

The defendants stress also that *Oestereich* involved a case of a statutorily granted exemption. But whether lawless action by a Local Board involves an exemption or a

deferment, the action remains lawless. Neither dictionary definitions nor semantic subtleties control basic statutory rights. It is clear from the I—S cases heretofore cited that the denial of the statutory right to II—S deferment under Section 6(i) (2) of the Act likewise calls for judicial review. We are aware, we note in passing, of Anderson v. Hershey, 410 F.2d 492 (C.A. 6, 1969), which limits the holding of the invalidity of the delinquency regulations in *Oestereich* to those situations in which the delinquency regulations apply to statutory exemptions.

In summary, as to jurisdiction, this matter concerns, not a deferment resting in the discretion of a Local Board or Selective Service official, but a deferment mandated by regulation; there is no factual question (or mixed question of fact and law) presented to the Court for decision, but a question of law only. Such legal question is, as well, applicable to an entire class of registrants, not simply to one particular individual. A civil action, moreover, in this Court, is the only feasible opportunity which this class of registrants has to present before a competent forum their legal arguments to obtain a determination, for the entire class, of the validity of their sought induction under these circumstances.

Upon a consideration of these factors it is our conclusion under the teachings of *Oestereich* that we have jurisdiction, that the cause of action shall be maintained as a class action, Rule 23, Rules of Civil Procedure, and that Regulation 1622.30(a), interpreted by defendants as hereinabove described, is illegal because founded on an erroneous interpretation of the Act and unauthorized thereby.

Suitable orders may be presented.

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

Stephen L. Gregory, et al.,
Plaintiffs-Appellees,
v.
Curtis W. Tarr, National Director of Selective Service, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed January 26, 1971

OPINION

Before: Weick, McCree, and Brooks, Circuit Judges.

Weick, Circuit Judge. Plaintiffs filed a class action in the District Court challenging the application and validity of a Selective Service Regulation defining eligibility of draft registrants for what is known as a "fatherhood deferment" under deferment classification III-A.[1] The plain-

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[1] Title 32, Code of Federal Regulations, section 1622.30 (January 1, 1970) provides, in pertinent part:

"(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their [sic] home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under

(continued on next page)

tiffs are draft registrants who have been re-classified I-A (available for military service) and ordered to report for induction. The defendants are the National Director of Selective Service, the State Directors of Selective Service of the states of Michigan, Indiana, Illinois and Minnesota, and a number of local boards and their members in said states. The class sought to be protected is limited to Selective Service registrants who have one or more children with whom they maintain a bona fide family relationship in their homes, who are not physicians, dentists or veterinarians or in an allied specialist category, and who have a post-baccalaureate student deferment (graduate II-S), but have not received a pre-baccalaureate student deferment (undergraduate II-S), under authority of the Military Selective Service Act of 1967, 81 Stat. 100, 50 U.S.C.A. App. § 451 *et seq.* Plaintiffs seek a declaratory judgment that the challenged regulation is invalid, at least as it is presently applied, and a mandatory injunction ordering classification in Class III-A (fatherhood deferment) for themselves and the class they seek to protect. Plaintiffs also seek to have declared void the orders to report for induction which each of them has received. Jurisdiction is allegedly founded on 28 U.S.C.A. §§ 1331, 1343, 1361, & 2201-02.

(continued from preceding page)

> authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph."

The fatherhood deferment provided by 32 C.F.R. § 1622.30(a) has been suspended by Executive Order 11,527 subsequent to the filing of the present case, but the order provides that those entitled to the deferment who requested it prior to the date of the Executive Order shall still be entitled to it thereafter. Exec. Order No. 11,527, 35 F.R. 6571, 6572 (April 23, 1970).

The action was submitted to the court upon the plaintiffs' motion for summary judgment and the defendants' motion to dismiss for lack of subject-matter jurisdiction and, in the alternative, for failure to state a claim upon which relief could be granted. The court had previously determined, upon plaintiffs' motion, the validity of the class action. The district court filed an opinion granting the plaintiffs' motion for summary judgment in which it determined that it had subject-matter jurisdiction over the action and that plaintiffs had presented an issue on which they were entitled to relief.[2] Defendants appeal from that judgment, contending that the federal courts are deprived of jurisdiction of this case by virtue of section 10 (b) (3) of the Military Selective Service Act of 1967 [hereinafter "the Act"], 50 U.S.C.A. App. § 460(b) (3), and that

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[2] Defendants have not questioned the validity of the class action although no notice to the members of the class was given as provided by Rule 23, Fed.R.Civ.P., nor have they questioned the jurisdiction of the court over the State Directors of Selective Service, the Local Boards and their members for the states of Indiana, Illinois and Minnesota.

Allowing class actions to be brought by Selective Service registrants to enjoin not only their own induction, but the induction of others similarly situated throughout the nation, can have a far-reaching and disruptive effect on the operation of the Selective Service System.

In *Whitmore v. Tarr* (D.Neb. Civ. 1963L, decided October 22, 1970), the court held that it was bound by the decision of the District Court in the present case on the ground of res adjudicata and enjoined the induction of a Nebraska registrant. In *Germonprez v. Director of Selective Service* (D.D.C. Civ. 1855-70, decided July 8, 1970), the court issued a preliminary injunction restraining the induction of a Kansas registrant on the basis of the present case. Query: Suppose that the District Court in the present case had ruled that the plaintiffs and others similarly situated were not entitled to III-A classification. Would such a decision be binding on a registrant from another state who had no notice of the action nor opportunity to defend against it?

In *Pasquier v. Tarr*, (W.D.La. Civ. 70-2056, decided October 14, 1970), the court declined to follow the decision of the district court in the present case.

the plaintiffs were properly denied fatherhood deferments under the authority of section 6(h) (2) of the Act, 50 U.S.C.A. App. § 456 (h) (2), and the pertinent regulation, 32 C.F.R. § 1622.30(a) (1970). We reverse.

In considering the 1967 Act. Congress was concerned about the decisions of some federal courts permitting earlier review of Selective Service decisions than had previously been thought permissible. Thus, Congress statutorily imposed the rule of judicial review which presently defines jurisdiction:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President except as a defense to a criminal prosecution [for refusing to report] after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided,* That such review shall go to the question of jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant." 50 U.S.C.A. App. § 460(b) (3) (1968).

As interpreted, the constitutionality of this provision has been upheld. *Clark v. Gabriel,* 393 U.S. 256 (1968). It has long been recognized that Congress has a legitimate interest in protecting from litigious delays and interruptions a governmental activity so inextricably intertwined with national security as the procurement and training of military personnel. *See, e.g. Falbo v. United States,* 320 U.S. 549 (1944). In interpreting section 10(b) (3) of the Act, however, the Supreme Court has held that a literal interpretation of the provision was not justified, in *Oestereich*

v. Selective Serv. Bd., 393 U.S. 233 (1968). A literal reading would, in the first instance, suspend the constitutionality protected writ of habeas corpus. 393 U.S. at 238. The Court also concluded that Congress did not intend to preclude pre-induction judicial review in the special circumstances presented by *Oestereich* and *Breen v. Selective Serv. Bd.*, 396 U.S. 460 (1970).

In *Oestereich,* a divinity student who was unquestionably exempted by statute from eligibility for induction, was nonetheless reclassified I-A on the authority of the now-defunct delinquency regulations for having turned in his draft card in protest of the Vietnam War. Oestereich sought a permanent injunction prohibiting his induction. His complaint was dismissed by the district court for lack of jurisdiction under authority of section 10(b) (3), and the United States Court of Appeals for the Tenth Circuit affirmed. The Supreme Court reversed, holding that pre-induction review was not precluded where the action of the local board was "blatently lawless" and beyond its statutory authority. *Breen* reaffirms the principle of *Oestereich* where a registrant had a statutory defement rather than a statutory exemption and the delinquency regulations were used to punish him for a draft card turn-in.

Contemporaneous with *Oestereich,* the Court announced its decision in *Clark v. Gabriel, supra,* holding that pre-induction judicial review was not available, except as a defense to a criminal prosecution, where the local board exercised, as contemplated by the statutory scheme, its judgment and discretion in granting or withholding certain categories of deferments. Plaintiffs seek to bring their allegations within the *Oestereich-Breen* exception to section 10(b) (3). In order to determine which line of decisions

will control the present controversy, it is necessary to pierce the pleadings and determine precisely what category is raised by the merits of this controversy. *Stella v. Selective Service Board,* 427 F.2d 887, 889 (2nd Cir. 1970).

The district court was of the opinion that it had jurisdiction since the question of whether the plaintiffs and the class they represent should be granted fatherhood deferments was not one committed to the discretion of the local boards and since no mixed question of law and fact or pure question of fact was presented to the Court for determination. The court then held that the regulation should be interpreted to refer only to undergraduate student deferments or, in the alternative, that the regulation was inconsistent with the Act. Having made this determination, the court upheld its jurisdiction since the action of the local boards was "basically lawless" under the proper view of the regulation and the Act. The plaintiffs support the district court's determinations by urging essentially two alternative grounds. They contend that, properly interpreted, the regulation denies fatherhood deferments only to those who have received *undergraduate* II-S deferment since the effective date of the Act. They offer two reasons for the suggested interpretation—that the ambiguity of the regulation should be construed to fit the explicit statutory denial of fatherhood deferments to those having obtained undergraduate deferments or that the regulation was promulgated by the President under a mistaken view that the law required deferments to be denied all registrants having obtained a student deferment, whether graduate or undergraduate. We can see no reason to accept the plaintiff's invitation to interpret the regulation. It is plainly worded and appears in Title 32 immediately following the regulations regarding separate undergraduate and graduate student deferments, which were

promulgated at the same time as the regulation in question. It is difficult to imagine, under these circumstances, how the Executive could have been unaware of the difference between undergraduate and graduate II-S deferment.

However, the plaintiffs also contend that the regulation is invalid if given its literal meaning as inconsistent with the statutory scheme. This strikes closer to our view of *Oestereich,* that only statutorily unauthorized actions of the Selective Service are open to pre-induction judicial review except as a defense to a criminal prosecution. However, this case falls short of the mark. Under the new statutory scheme enacted in 1967, two new student deferment categories were created. Section 6(h) (1) of the Act provides that "the President *shall* . . . [defer] persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning. . . . A deferment granted to any person under authority of the preceding sentence *shall continue* until such person completes the requirements for his baccalaureate degree . . . " (emphasis added). However, the Act does not similarly create graduate or fatherhood deferments by its own force alone. Rather, in section 6(h) (2) of the Act, the President is *authorized* to provide for deferment of graduate students "under such rules and regulations as he may prescribe. . . . " The same paragraph further provides that:

> " . . . [T]he President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment . . . *of any or all categories* of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes." (Emphasis added).

Thus, both the graduate student deferment and the fatherhood deferment are matters of Executive grace which can be made subject to any reasonable conditions, rather than matters of statutory right. The Executive has exercised its discretion to provide for both graduate deferments and fatherhood deferments, but has pre-conditioned the latter deferment on not having requested and received a graduate student deferment so as to preclude the "pyramiding" of deferments into complete exemption from military service. Clearly, the exercise of this discretion expressly bestowed upon it by Congress does not involve the Executive or the Selective Service System in conduct unauthorized by statute, as was envisioned by the Court in the *Oestereich* decision. To the contrary, *Oestereich* presented a situation where the Selective Service System attempted to exercise punitive powers which Congress had not given it, having already prescribed a set of criminal penalties for violation of the Act. Here, the Act expressly bestows upon the Executive the discretion the exercise of which is challenged.

The judgment of the district court is reversed, and the cause is remanded with instructions to dismiss the complaint.

Reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1625

STEPHEN L. GREGORY, ET AL., PETITIONERS

v.

CURTIS W. TARR, NATIONAL DIRECTOR OF SELECTIVE SERVICE, ET AL.

No. 1556

THOMAS E. WHITMORE, PETITIONER

v.

CURTIS W. TARR, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SIXTH AND EIGHTH CIRCUITS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Gregory* (G. Pet. App. 36–43) is reported at 436 F. 2d 513. The opinion of the district court (G. Pet. App. 28–35) is reported at 311 F. Supp. 1.

The order of the court of appeals in *Whitmore* (W. Pet. App. C) is not yet reported. The opinion of the district court (W. Pet. App. B) is reported at 318 F. Supp. 1279.

JURISDICTION

The judgment of the court of appeals in *Gregory* was entered on January 26, 1971, and the petition for a writ of certiorari was filed on April 24, 1971. The judgment of the court of appeals in *Whitmore* was entered on February 24, 1971, and the petition for a writ of certiorari was filed on April 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3), bars pre-induction judicial review of petitioners' claims that they are entitled to fatherhood deferments.

STATUTES AND REGULATION INVOLVED

Section 6(h) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 456(h), provides in pertinent part:

> (1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the

date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. * * *

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons * * * whose activity in graduate study, * * * or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest * * *. Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. * * *

32 C.F.R. 1622.30(a) (January 1, 1970) provided:

> (a) In Class III–A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home * * * except that a registrant who is classified in Class II–S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III–A under the provisions of this paragraph.

STATEMENT

These civil suits were instituted by Selective Service registrants seeking pre-induction judicial review of the refusal by their local boards to grant them III–A fatherhood deferments pursuant to Section 6 (h)(2) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. V) 456(h)(2)) and 32 C.F.R. 1622.30(a) (January 1, 1970).[1] Petitioners, who had received II–S student deferments as graduate students (but not as undergraduates) under the 1967 Act, were denied fatherhood deferments pursuant to the proviso in 32 C.F.R. 1622.30(a), making ineligible for a III–A deferment any "registrant who is classified in Class II–S after the date of enactment" of the 1967 Act on June 30, 1967. They seek to enjoin their induction and to compel their local boards to place them in Class III–A.

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[1] Executive Order No. 11527, April 23, 1970, 35 F.R. 6571, has terminated the availability of the III–A fatherhood deferment, and 32 C.F.R. 1622.30(a), as cited above, was revoked by that order. However, this change does not apply to persons, such as petitioners, who claim eligibility accruing prior to that date. All references herein to 32 C.F.R. 1622.30(a) are to the regulation as it stood prior to that change.

1. The *Gregory* suit was commenced as a class action in the United States District Court for the Eastern District of Michigan on behalf of all registrants claiming a fatherhood deferment prior to April 23, 1970, who had previously received a II–S graduate student deferment subsequent to June 30, 1967, but not a II–S undergraduate student deferment after that date. It was argued that these registrants were entitled to a III–A fatherhood classification as a matter of law, and thus that the local boards' denials of such claims warranted pre-induction review within the narrow judicial exception to Section 10(b)(3).

The district court (G. Pet. App. 28–35) found that the question presented could properly be entertained by the courts in a civil action instituted prior to induction and decided the merits in favor of petitioners, both individually and as a class.[2] It concluded that Section 6(h)(1) and (2) required that registrants within the designated class be granted fatherhood deferments, and thus 32 C.F.R. 1622.30(a) could not properly be interpreted to deny the III–A classification to those whose only II–S deferment after June 30, 1967 was for graduate, as distinguished from undergraduate, studies (G. Pet. App. 28–33).

On January 26, 1971, the court of appeals reversed (G. Pet. App. 36–43), holding that the issue raised was

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[2] Respondents did not question the validity of the class action despite the fact that no notice to the members of the class was given as provided by Rule 23, Fed. R. Civ. P. But see G. Pet. App. 38 n. 2.

not a proper question for pre-induction judicial review. It ruled that Congress had delegated to the President authority to grant both graduate student and fatherhood deferments, under such conditions and with such limitations as he, in his discretion, deemed advisable (G. Pet. App. 42–43). Since the promulgation of 32 C.F.R. 1622.30(a) was considered by the court to be a proper exercise of that authority, and the regulation by its terms excluded those receiving any II–S classification under the 1967 Act from eligibility for fatherhood deferment, the court below held that there was no occasion to review the administrative denials of III–A classifications to this class of registrants prior to the dates set for their inductions. An application for a stay of the mandate was denied by the court of appeals, and a further application for a stay was denied by this Court on March 29, 1971.

2. The *Whitmore* suit was instituted in the United States District Court for the District of Nebraska following the district court's decision in *Gregory*. Whitmore claimed that he was a member of the class entitled to protection under the *Gregory* decree. The *Whitmore* district court, although disagreeing with the jurisdictional holding of the district court in *Gregory* (W. Pet. App. B 1281–1283), concluded that *Gregory* was a valid class action and that Whitmore was a member of the class; it thus considered itself bound by the *Gregory* judgment (W. Pet. App. B 1285–1286).

On appeal to the Eighth Circuit, the court of appeals, following the Sixth Circuit's reversal in *Greg-*

ory, entered an order vacating the judgment of the district court and remanding the cause "for further consideration in light of *Gregory* v. *Tarr,* [436 F. 2d 513] * * *" (W. Pet. App. C). It is this ruling which Whitmore seeks to have this Court review.

ARGUMENT

Petitioners assert here, as they did below, that the denial of fatherhood deferments to those who have held II–S graduate student deferments after June 30, 1967, is a clear error of law by the local boards, and thus that their civil suits are within that limited category of Selective Service cases deserving pre-induction judicial review under the decisions by this Court in *Oestereich* v. *Selective Service Board,* 393 U.S. 233, and *Breen* v. *Selective Service Board,* 396 U.S. 460. We cannot agree. In those cases, this Court carved out an exceedingly narrow exception to the statutory proscription on judicial review of the administrative classification and processing of Selective Service registrants prior to the time that they had "responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3); compare *Clark* v. *Gabriel,* 393 U.S. 256. The predicate for entertaining pre-induction jurisdiction in both cases was a judicial determination that the action in question involved "a clear departure by the [local] Board from its statutory mandate." *Breen* v. *Selective Service Board,* 396 U.S. 460, 467; see also *Gutknecht* v. *United States,* 396 U.S. 295.

Here, however, unlike *Oestereich, Breen,* and *Gutknecht,* we are not concerned with any such departure.

The fatherhood deferment claimed in these cases is a matter which Congress has left almost entirely within the discretion of the President, to grant or to terminate (see n. 1, supra) as he sees fit with respect to "any or all categories" of fathers, "under such rules and regulations as he may prescribe." 50 U.S.C. App. (Supp. V.) 456(h)(2). The only statutory limitation on the President's exercise of discretion in this area is contained in Section 6(h)(1), 50 U.S.C. App. (Supp. V) 456(h)(1), which specifically prohibits the assignment of III–A fatherhood deferments to registrants who have previously received II–S *undergraduate* student deferments since June 30, 1967.

A. Petitioners contend (G. Pet. 16–18) that, because Congress confined the restriction in Section 6(h)(1) to undergraduate students, the President was without authority to promulgate a regulation (32 C.F.R. 1622.30(a)) also depriving graduate students of fatherhood deferments. But, nothing in the 1967 Act, either explicitly or by implication, guarantees graduate students a right to III–A classification if they subsequently become fathers. If the President has authority to terminate the fatherhood deferment altogether, which is not disputed (G. Pet. 9 n. 1), he plainly is authorized by the statute to terminate it with respect to "any * * * categories of persons who have children * * *" (50 U.S.C. App. (Supp. V) 456 (h)(2).[3] Nor to our knowledge has any appellate

[3] The instant cases are thus unlike the "I–S" cases on which petitioners place heavy reliance (G. Pet 13). Section 6(i)(2), 50 U.S.C. App. (Supp. V) 456(i)(2) *mandates* that a student who has been ordered to report for induction "shall" be deferred—

court held otherwise. Indeed, the sole support for petitioners' contention is found in the concurring opinion of three judges in *Hunt* v. *Local Board,* No. 18,076, decided February 5, 1971, an *en banc* decision in the Third Circuit (G. Pet. 21–23). Not only did the views expressed there fail to command a majority, but, more to the point, they relied exclusively on the district court's decision in *Gregory,* which has now been reversed by the Eighth Circuit.

B. Petitioners maintain, however, that, even if the President is authorized by statute so to circumscribe the fatherhood deferment, he has not done so in explicit terms; thus, they argue (G. Pet. 11–12), for the local boards to construe 32 C.F.R. 1622.30(a) as precluding graduate students from obtaining a III–A classification is "blatantly lawless" action, as that term was used in *Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 237. This contention is without merit.

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under a I–S classification (32 C.F.R. 1622.15(b))—until the end of the current academic year. Thus, the courts have construed both the statute and the regulation as entitling both undergraduate and graduate students to the mandatory I–S deferment if they are called up before the end of the academic year. See, *e.g.*, *Carey* v. *Local Board*, 297 F. Supp. 252 (D. Conn.), affirmed, 412 F. 2d 71 (C.A. 2); *Nestor* v. *Hershey*, 425 F. 2d 504 (C.A. D.C.); *Bowen* v. *Hershey*, 410 F. 2d 962 (C.A. 1) (on stay pending appeal), on merits *sub nom. Crane* v. *Hershey*, 410 F. 2d 966 (C.A. 1); *Foley* v. *Hershey*, 409 F. 2d 827 (C.A. 7). And that construction has been followed by Selective Service. See Local Board Memorandum No. 87, as amended, September 24, 1970. But, as shown above, there is no similar statutory mandate with respect to the fatherhood deferments entrusted by Section 6(h)(2) to the discretion of the President.

The questioned regulation provides in pertinent part (32 C.F.R. 1622.30(a)):

> (a) In Class III–A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home * * * except that a registrant who is classified in Class II–S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III–A under the provisions of this paragraph.

This language has consistently been construed by the government as precluding both undergraduate and graduate students from obtaining fatherhood deferments, primarily to discourage the practice of "pyramiding" deferments in order to obtain total exemption from military service. See, *e.g., Wright* v. *Local Board,* 319 F. Supp. 509 (D. Minn.), appeal pending, C.A. 8, No. 71–1011; *Unted States ex rel. Plotner* v. *Resor,* 3 S.S.L.R. 3342 (S.D. Ga.), appeal pending, C.A. 5, No. 31030; *Germonprez* v. *Director of Selective Service,* 318 F. Supp. 829 (D.D.C.); *Pasquier* v. *Tarr,* (W.D. La.), appeal pending, C.A 5, No 30,934 Such a construction is plainly warranted by the terms of the regulation (cf. *Ehlert* v. *United States,* No. 120, this Term, decided April 21, 1971, slip op. 6–7), and thus the administrative denials of fatherhood deferments in the instant cases cannot reasonably be labeled "blatantly lawless" action by the local boards, even assuming *arguendo* that the regulatory language might also lend itself to the construction urged by petitioners. Otherwise, every challenge to an interpretation by the Se-

lective Service System of its own regulations would come within the *Oestereich* and *Breen* exception. Cf. *Swift* v. *Director of Selective Service,* C.A.D.C., No. 24,137, decided March 16, 1971, petition for rehearing pending, erroneously characterizing the local board's interpretation of 32 C.F.R. 1625.2—in the manner later upheld by this Court in *Ehlert*—as "blatantly lawless" action entitled to pre-induction judicial review.

C. Accordingly, the courts below properly declined to entertain jurisdiction of these civil suits, instituted prior to the time when the registrants had "responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3). We agree with petitioners (G. Pet. 26) that the issue now before the Court in *Fein* v. *Selective Service System Local Board No. 7,* certiorari granted, March 8, 1971, No. 1129, this Term, is not in these cases; there, the challenge is to appellate administrative procedures solely on constitutional grounds, whereas, here the challenge is to the substantive regulation—plainly authorized by the statute—that mandates the denial of the deferments sought by petitioners. There is thus no need to hold these cases pending disposition of *Fein.*

Moreover, since there is no longer a III–A deferment for fatherhood status (supra n. 1) or a general II–S deferment for graduate students,[4] the regu-

[4] The 1967 Act specifically precludes the granting of a II–S graduate student deferment to registrants who have received an undergraduate student deferment after June 30, 1967 (50 U.S.C. App. (Supp. V) 456(h)(1)), unless the graduate student is "pursuing a course of graduate study in medicine, den-

latory interpretation question presented in these petitions is of no continuing importance and does not warrant further consideration by this Court.

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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MAY 1971.

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tistry, veterinary medicine, osteopathy or optometry, or in such other subjects necessary to the maintenance of national health, safety, or interest as are identified by the Director of Selective Service upon the advice of the National Security Council." 32 C.F.R. 1622.26; 50 U.S.C. App. (Supp. V) 456(h)(2). The Director has not yet identified any "other subjects" as necessary to the maintenance of the national health, safety or interest.

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OCTOBER TERM, 1970

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Petitioners,
v.
CURTIS W. TARR, National Director of
Selective Service, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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A. The Government, in its opposing brief in Nos. 1625 and 1556, continues, as it did below, to seek to distinguish *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233 (1968), and *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970), by pulling scattered phrases out of context from those opinions and arguing that the distinctions to be drawn therefrom are dispositive. The act of the local board, the Government argues, must be "blatantly lawless"; it must involve "a clear departure by the Board from its statutory mandate." What the Government fails to do is to suggest a consistent theory whereby the underlying rationale of the *Oestereich* and *Breen* opinions may be reconciled with the opinion of the

Sixth Circuit below. As shown in the Petition in No. 1625 (pp. 9-15, 24-27 [hereinafter "Petition"]), that opinion cannot be reconciled with *Oestereich* and *Breen* whether those opinions be taken as making judicial review depend on the mandatory nature of the classification in question or on the competence of the Selective Service processes to adjudicate the issue in question.

The instant case, involving as it does a mandatory regulation and a purely legal question beyond the competence of the System, falls within either rationale. (Petitioners note in passing that *McGee v. United States,* 39 U.S. L.W. 4571 (No. 362, May 17, 1971), is a further indication that judicial review is available in those instances in which a legal question is presented but not in those instances where the Selective Service System provides a competent forum for review of factual and discretionary questions. Although *McGee* is a criminal case, it concerns the exhaustion of Selective Service administrative remedies, the doctrine traditionally applied to deny review in civil pre-induction cases. *See Estep v. United States,* 327 U.S. 114, 123 (1946). *McKart v. United States,* 395 U.S. 185 (1969), and *McGee* when read together clearly hold that exhaustion of administrative remedies need not occur when the question involved is, as in the instant case, a purely legal one.)

Not only does the Government's brief ignore the underlying rationale of *Oestereich* and *Breen,* but it also fails to note the widely varying opinions in the circuits concerning the question of pre-induction judicial review (Petition, pp. 23-26). In this regard, the Eighth Circuit has recently joined the Third (Petition, pp. 13-15, 21-22) and D.C. (Petition, pp. 13-15 & n.1, *infra*) Circuits in holding, contrary to the judgment of the Sixth Circuit below, that legal issues of regulatory interpretation are cognizable in pre-induc-

tion judicial review. *Liese v. Local Bd. No. 102*, 3 S.S.L.R. 3860 (8th Cir. Mar. 29, 1971); *Zerillo v. Local Bd. No. 102*, 3 S.S.L.R. 3861 (*ibid.*). Even if the law were as clear as the Government would like to make it be, such conflict among the circuits should lead this Court to grant review in the instant case.

Nor do petitioners concede, as the Government would have them concede (Gov. Brief, p. 11), that the issue before the Court in *Fein v. Selective Service System Local Board No. 7*, 430 F.2d 376 (2d Cir. 1970); *cert. granted*, 39 U.S.L.W. 3384 (No. 1129, Mar. 8, 1971), is not presented in the instant case. Rather, they contend, as argued in the Petition (pp. 26-27), that this case presents other aspects of the *same* issue, i.e., the scope of pre-induction judicial review. True, as conceded in the Petition, this case does not present the square conflict between the mandatory classification and competent forum tests that the *Fein* case does, but, like *Fein*, it presents an opportunity for clarification of the nature and contents of those tests. A ruling for petitioners in *Fein* would necessarily cast into doubt the judgment of the Sixth Circuit below since that judgment ignores the law-fact distinction which lies at the heart of the *Fein* case and of the competent forum test. On the other hand, a ruling in this case rather than in *Fein* would give this Court an opportunity to avoid the square conflict between the mandatory classification and competent forum tests raised by *Fein* and would permit further evolution of the doctrine of pre-induction review in the circuits.

B. Turning to the merits of the case, the Government, without attempting to deny that petitioners' interpretation of the Regulation in question is plausible, argues, rather, that the litigation positions taken by it bring the interpretation of that Regulation within the doctrine of *Ehlert v.*

United States, 39 U.S.L.W. 4453 (No. 120, April 21, 1971). It is difficult to see how the Government derives much consolation from the *Ehlert* case.[1] *Ehlert* involved a purely administrative regulation concerning the right of a registrant, after his induction order had been issued, to have his claim determined by his local board rather than the appropriate military authorities. Faced with an ambiguity in the Regulation, this Court chose to rely on a "reasonable, consistently applied administrative interpretation . . ." 39 U.S.L.W. 4455. The case at bar however, involves an interpretation of the Regulation in question which is unreasonable in the light of the Military Selective Service Act and its legislative history (Petition, pp. 16-18) and in the distinctions which it seeks to draw between those who have had a discretionary student deferment and those who have had other discretionary deferments (Petition, pp. 20-21).

Further, the interpretation which the Government has urged in litigation has been anything but consistently applied administratively. There are a number of cases of which counsel is aware in which registrants have been granted fatherhood III-A deferments in precisely the same situation of petitioners who have been denied them in the instant case. Further, the only administrative interpretation issuing from National Headquarters of the fatherhood III-A Regulation preserved, for a time, the ambiguity of the Regulation. Local Bd. Memorandum No. 105, ¶17, Apr. 23, 1970, S.S.L.R. 2200: 14 (Feb. 1970). Currently, the

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[1] Nor is it easy to see how the Government derives much consolation from *Swift v. Director of Selective Service,* 3 S.S.L.R. 3839 (D.C. Cir. Mar. 16, 1971). However incorrect the judgment in that case may be on the merits in the light of *Ehlert,* it constitutes a clear holding that pre-induction review is available on questions of regulatory interpretation This holding clearly conflicts with the judgment of the Sixth Circuit in the instant case and presents an issue not present in *Ehlert,* which was a criminal and not a pre-induction review case.

Memorandum contains no reference to the bar on granting the deferment to those who have had the II-S since June 30, 1967, and implies that no such bar exists. *Id.*, as amended, Nov. 18, 1970, S.S.L.R. 2200: 14 (current). The interpretation of a similar reference to the II-S deferment in the Regulation concerning the I-S(C) deferment has also vacillated: for a while the I-S(C) Regulation was interpreted in a manner consistent with that which the Government is urging in the instant case. Local Bd. Memorandum No. 87, Apr. 19, 1968, S.S.L.R. 2200 (May, 1968). Recently, however, that interpretation has been reversed, and the Selective Service System is now interpreting the I-S(C) Regulation to refer only to the undergraduate and not the graduate II-S. *Id.*, as amended, Sept. 24, 1970, S.S. L.R. 2200 (current). Administrative consistency, if that is the criterion, would require that the similar language in the fatherhood regulation be interpreted in the same way.

C. The history of the I-S(C) Regulation also indicates another critical issue in this case, one which the Government conveniently chooses to ignore in its brief. As the litigation concerning the I-S(C) deferment and the checkered history of the interpretation of the Regulation indicate, the Government has not always conceded, as it does now (Gov. Brief, p. 8), that the Act forbids only those who have had the *undergraduate* II-S student deferment since June 30, 1967, from receiving the fatherhood III-A and I-S(C) deferments. The actions of the Selective Service System, the language of the Regulations, and the consistent position taken until very recently by the Government in litigation all indicate that the Government was laboring under the erroneous interpretation of the Act that all those who have had any sort of II-S student deferment since June 30, 1967, were barred from receiving the fatherhood III-A. Thus, what the Government now claims were acts of discretion by the President in promulgating regulations deny-

ing the fatherhood III-A deferment to those who had had the graduate II-S since June 30, 1967, were in fact not acts of discretion at all. They were, rather, acts which the Executive erroneously believed were controlled by the relevant law. In such a situation, as numerous decisions of this Court hold, the appropriate judicial reaction is to correct the administrative mistake of law (Petition, pp. 18-20).

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The Government has not denied the importance and substantiality of the issues concerning pre-induction review raised by this case. Its only claim is that the number of litigants involved in this case is too few to warrant review on the merits. Granted, however, the substantiality of the jurisdictional questions, and granted that the liberty, and perhaps even lives, of an admittedly small class of registrants is at stake, petitioners suggest that review of the decision below is in order.

Respectfully submitted,

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